

JAN 22 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

CHARLES DeMARTINO,

Petitioner,

- against -

NEW YORK CITY TRANSIT AUTHORITY, HON.
DANIEL GUTMAN, Hearing Referee, New
York City Transit Authority Trial
Board, GEORGE BUCKLEY, Vice President,
Labor Relations, New York City Transit
Authority, HON. MICHAEL WEIL, Chief
of Eligibility Unit, New York City
Employees Retirement System, NEW YORK
CITY EMPLOYEES RETIREMENT SYSTEM, HON.
JAMES B. MEEHAN, Chief New York City
Transit Police Department, DAVID GUNN,
President, New York City Transit
Authority, and THE NEW YORK CITY
TRANSIT AUTHORITY,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION, SECOND DEPARTMENT

APPENDIX FOR PETITIONER

SAM POLUR, Esq.
Attorney for Petitioner
206 W. 23rd St., 3rd Fl.
New York, New York 10011
(212) 366-6737

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STATE OF NEW YORK,
COURT OF APPEALS

At a session of the
Court, held at Court of
Appeals Hall in the City
of Albany on the
Twenty-fourth day of
October, A.D. 1989

Present,
HON. SOL WACHTLER
Chief Judge, presiding.

Mo. No. 1007

In the Matter of Charles
DeMartino,
Appellant,
v.
Michael Weil, & c., et. al.,
Respondents.

In the Matter of Charles
DeMartino,
Appellant,
v.
New York City Transit
Authority, et. al.,
Respondents.

A motion for leave to appeal to the
Court of Appeals in the above cause having
heretofore been made upon the part of the
appellant herein and papers having been
submitted thereon and due deliberation
having **been** thereupon had, it is



ORDERED, that the said motion be
and the same hereby is dismissed as un-
timely.

s/

Donald M. Sheraw
Clerk of the Court



SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPT.

____AD2d____

Argued - March 7, 1989

CHARLES B. LAWRENCE, J.P.
THOMAS R. SULLIVAN
STANLEY HARWOOD
VINCENT R. BALLETTA, JR., JJ.

340E

DECISION &
ORDER

In the Matter of Charles
DeMartino, appellant v.
Michael Weil, etc., et al.,
respondents.

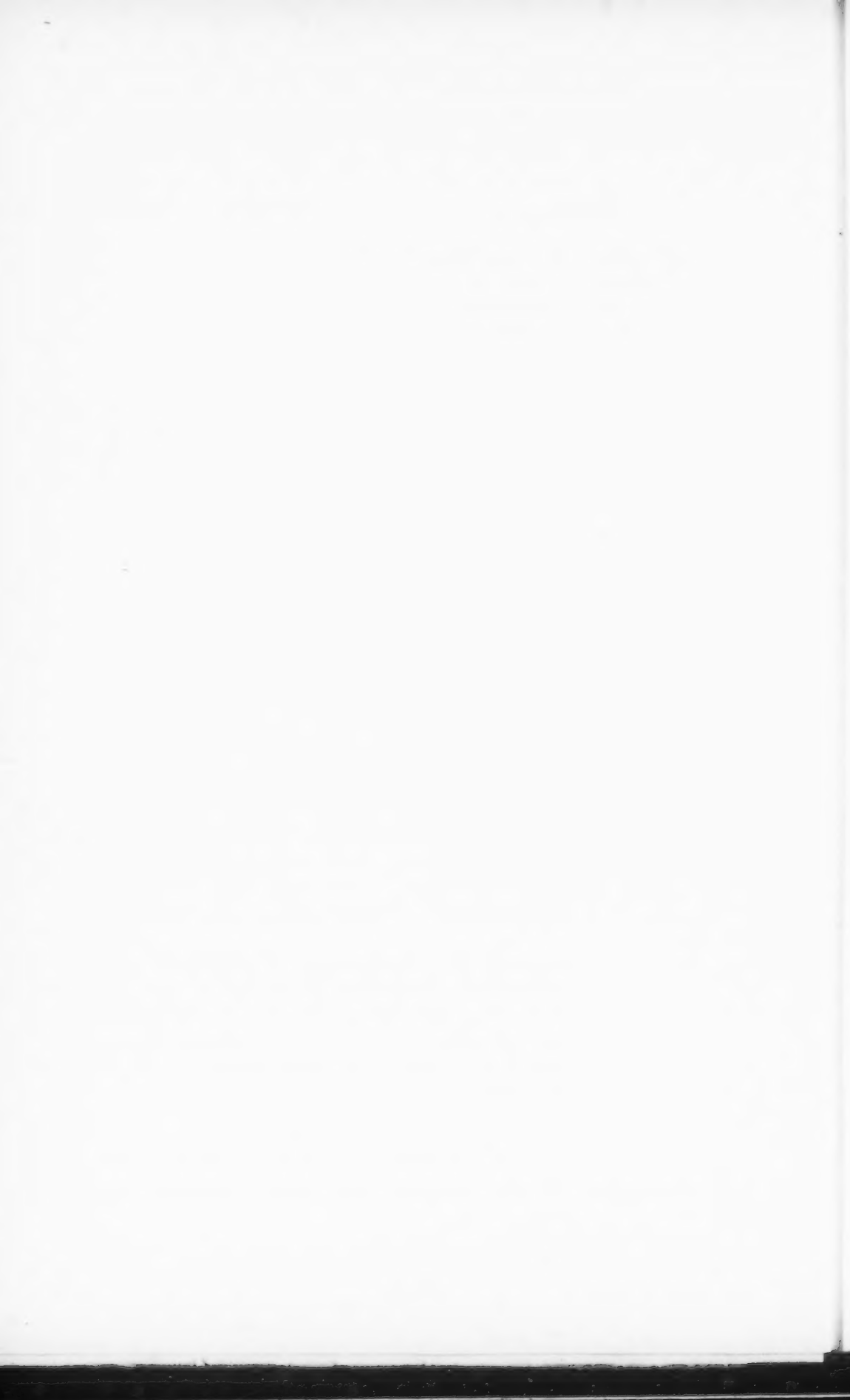
In the Matter of Charles
DeMartino, appellant, v.
New York City Transit
Authority, et al.,
respondents.

Sam Polur, Bronx, N.Y., for appellant.

Peter L. Zimroth, Corporation
Counsel, New York, N.Y. (Edward F.X.
Hart, Jean Brandon and Julie O'Neill
of counsel), for respondents
Michael Weil and the New York City
Employees' Retirement System.

Albert C. Cosenza, Brooklyn, N.Y.
(Kenneth Howard Schifffrin of counsel),
for respondents James B. Meehan,
David Gunn, Daniel Gutman, Jim
Buckley and the New York City Transit
Authority.

In (1) a proceeding pursuant to CPLR
article 78 to compel the respondents Michael



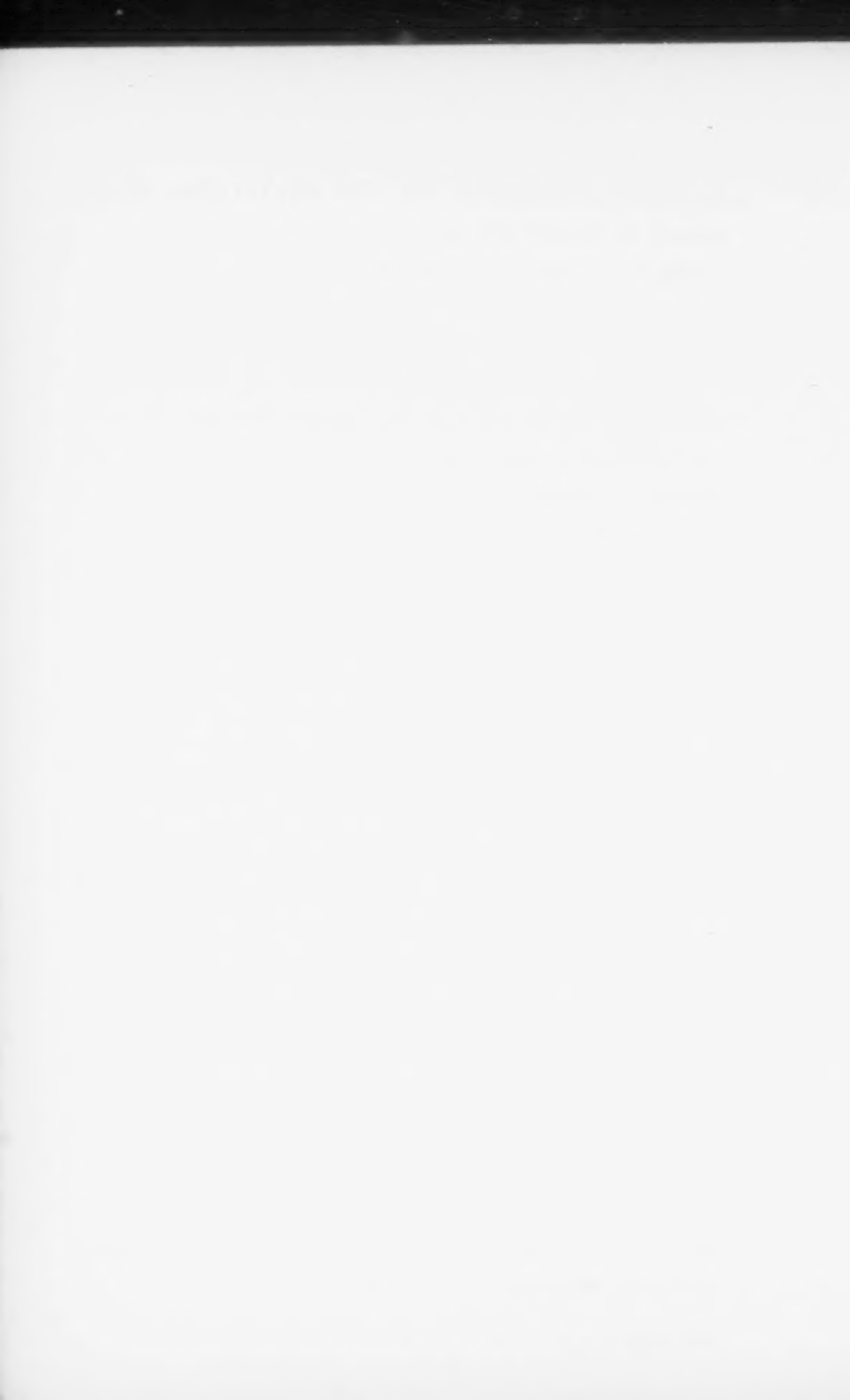
Weil and the New York City Employees' Retirement System to pay the petitioner his pension benefits and to prohibit the respondents James B. Meehan, David Gunn, and the New York City Transit Authority from interfering with payment of those benefits, and (2) a proceeding pursuant to CPLR article 78 to review a determination of the respondents New York City Transit Authority, Daniel Gutman, and George Buckley, which dismissed the petitioner from his position as a New York City Transit Police Officer, the petitioner appeals from a judgment of the Supreme Court, Kings County (Jutcherson, J.), dated February 11, 1987, which denied both petitions in their entirety.

ORDERED that the judgment is affirmed, without costs or disbursements.

Contrary to the petitioner's contention, it was not necessary for the respondent New York City Transit Authority to reinstate him on the payroll before holding a hearing to reconsider what penalty to impose (cf., Matter of Brooklyn Audit Co. v. Department of Taxation & Finance, 275 NY 284; Matter of Flood v. Monaghan, 201 Misc. 560).

We have considered the petitioner's remaining contentions and find them to be without merit.

LAWRENCE, J.P., SULLIVAN, HARWOOD and



BALLETTA, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

April 24, 1989 IN RE DeMARTINO v. WEIL



M E M O R A N D U M

SUPREME COURT: KING COUNTY
_____X

TRIAL TERM,
PART 25

In the Matter of the
Application of

By:
HUTCHERSON, J.

CHARLES DeMARTINO,
Petitioner,

Index No.
24426/86

For a Judgment under
Article 78 of the Civil
Practice Law and Rules,
For a Writ in the Nature
of Certiorari and a
Writ in the Nature of
Prohibition

Dated:
February 11,
1987

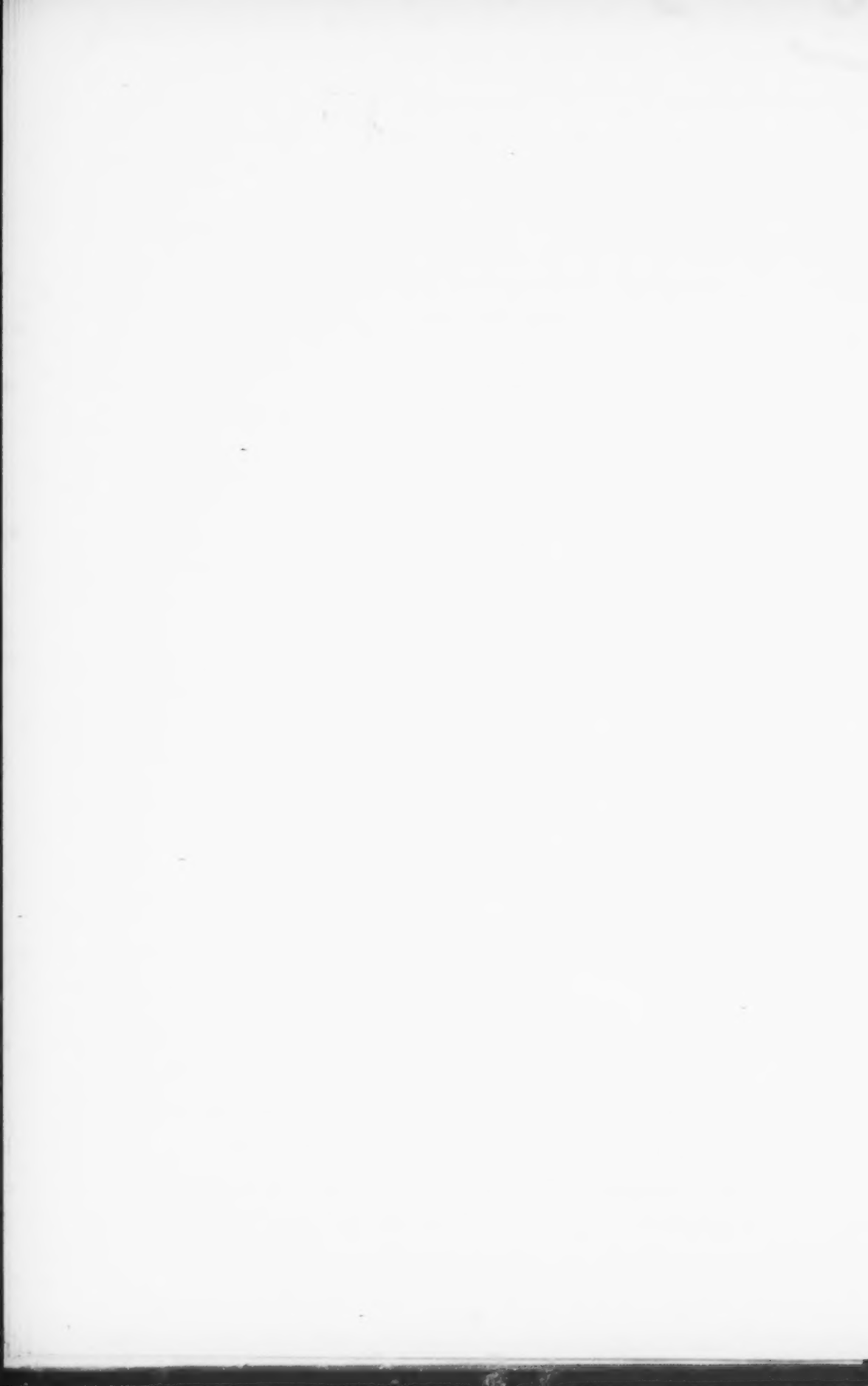
-against-

NEW YORK CITY TRANSIT
AUTHORITY, HON. DANIEL
GUTMAN, Hearing Referee,
New York City Transit
Authority Trial Board,
JIM BUCKLEY, Vice Presi-
dent, Labor Relations,
New York City Transit
Authority,

Respondents.

_____X

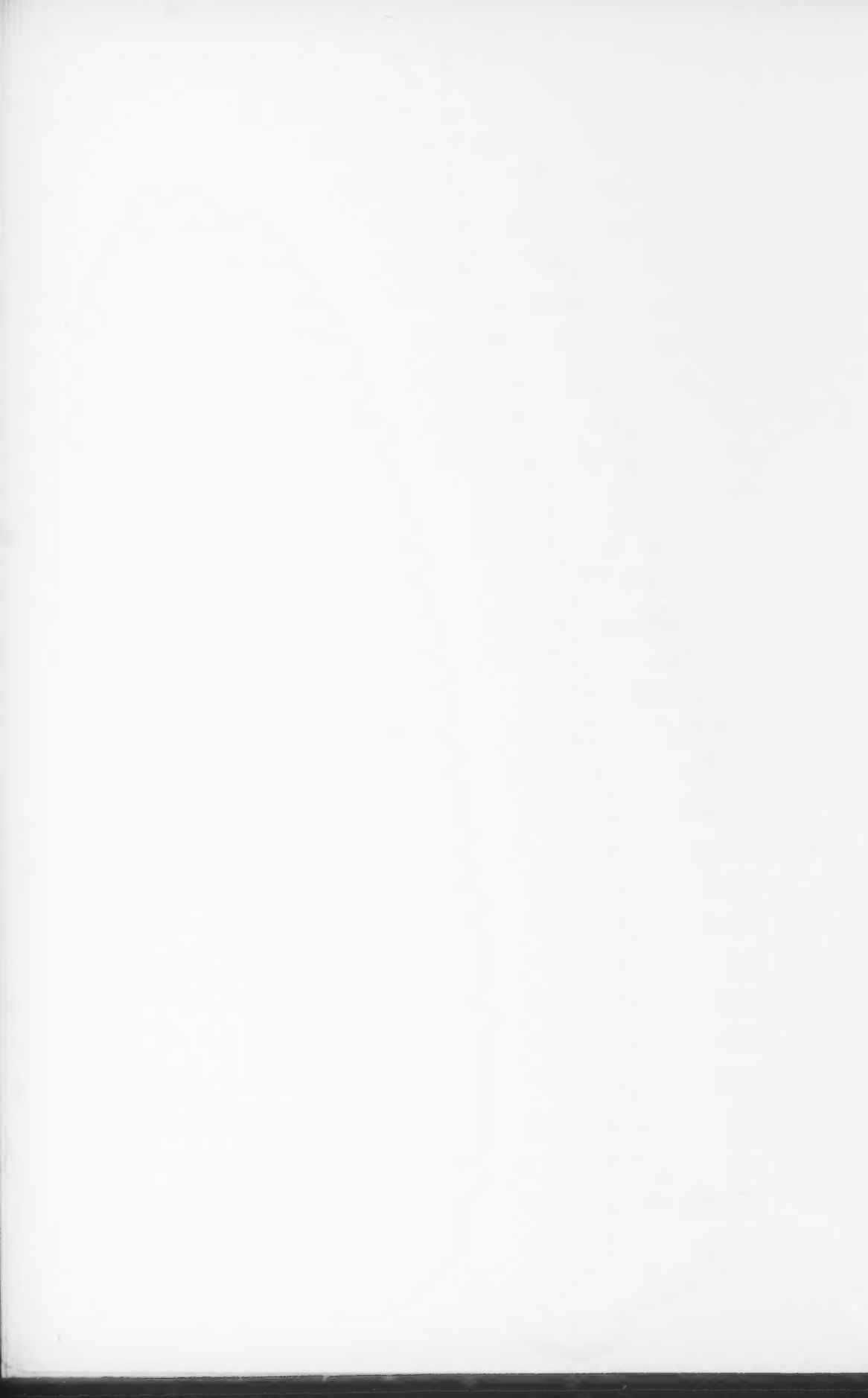
Prior to the commencement of
either of the within mentioned special
proceedings, the petitioner, Charles
DeMartino, a police officer of New York
City Transit Authority was charged with
misconduct on January 19, 1983; after a
hearing, findings of misconduct and
recommendations to discharge were made
December 10, 1983. Pursuant to CPLR
Article 78 a special proceeding bearing



index #14968/86 was initiated by a petition of Charles DeMartino which was verified May 23, 1984 to review the determination of respondents Robert Kiley, Chairman of New York City Transit Authority et al. and vacate the same. The respondents answered, discussions were had and by order of the Supreme Court, Kings County, the proceeding was transferred to the Appellate Division, Second Department.

The petition was granted by the Appellate Division on February 18, 1986 but only to the extent of vacating the penalty imposed and remitting to respondent New York City Transit Authority for reconsideration of the sole issue of an appropriate penalty. The reason for vacatur of penalty being ..., "however in determining an appropriate sanction, the Hearing Officer consulted petitioner's departmental file with respect to his prior disciplinary record ... In view of the Hearing Officer's failure to notify petitioner ... a remittal is required." DeMartino v. Kiley, 117 AD2d 702.

Petitioner was thereafter given an opportunity to rebut or mitigate the evidence or data contained in his personnel



file as urged by the Appellate Division, Second Department and a hearing was held on June 26, 1986 for that purpose. The decision reached adhered to the first disciplinary finding.

The decision and its recommendation approved were reached and became effective July 1, 1986, one day prior to petitioner's requested retirement date.

Meanwhile the first of the two within special proceedings for a writ in the nature of mandamus and for writ of prohibition as to others bearing index #15944/86 was commenced by Order to Show Cause dated June 25, 1986, the respondents, New York City Employees' Retirement System, New York City Transit Authority, Michael Weil, Chief of Eligibility Unit, New York City Employees' Retirement System, David Gunn, President of New York City Transit Authority and James B. Meehan to process petitioner's pension application for retirement benefits to take effect July 2, 1986.

Petitioner then subsequently on September 12, 1986 initiated by Order to Show Cause the second special proceeding pursuant to CPLR Article 78 and Sec. 76 Civil Service Law for a writ in the nature of certiorari and prohibition bearing



index #24426/86, requesting a review of the disciplinary proceedings conducted by New York City Transit Authority and the other respondents therein, namely; Daniel Gutman, Hearing Referee, New York City Transit Authority Trial Board, George Buckley, Vice President Labor Relations, New York City Transit Authority.

Respondents cross move to dismiss the petition in both special proceedings.

The petition bearing index number 15944/86 which seeks an order directing Michael Weil, Chief of Eligibility Unit of New York City Employees' Retirement System and the New York City Employees' Retirement System to pay petitioner his pension benefits and prohibiting James B. Meehan, Chief of New York City Transit Authority Police Department, David Gunn, President, New York City Transit Authority and the New York City Transit Authority from interfering with payment of said pension benefits is resolved in the following fashion.

The relief requested by petitioner is denied in its entirety. The Court discerns no denial of petitioner's rights to due process and equal protection of the

laws nor was any of petitioner's constitutional rights violated. To the extent that the order directs in the special proceeding bearing index #149768/86 captioned:

In the Matter of
The Application of
Charles DeMartino,

Petitioner,

For a Judgment under Article 78
of the CPLR for a writ in the
nature of Mandamus

-against-

James B. Meehan, Chief of
NYCT Police Dept., David
Gunn, Pres., NYCTA and
The New York City Transit
Authority,

Respondents.

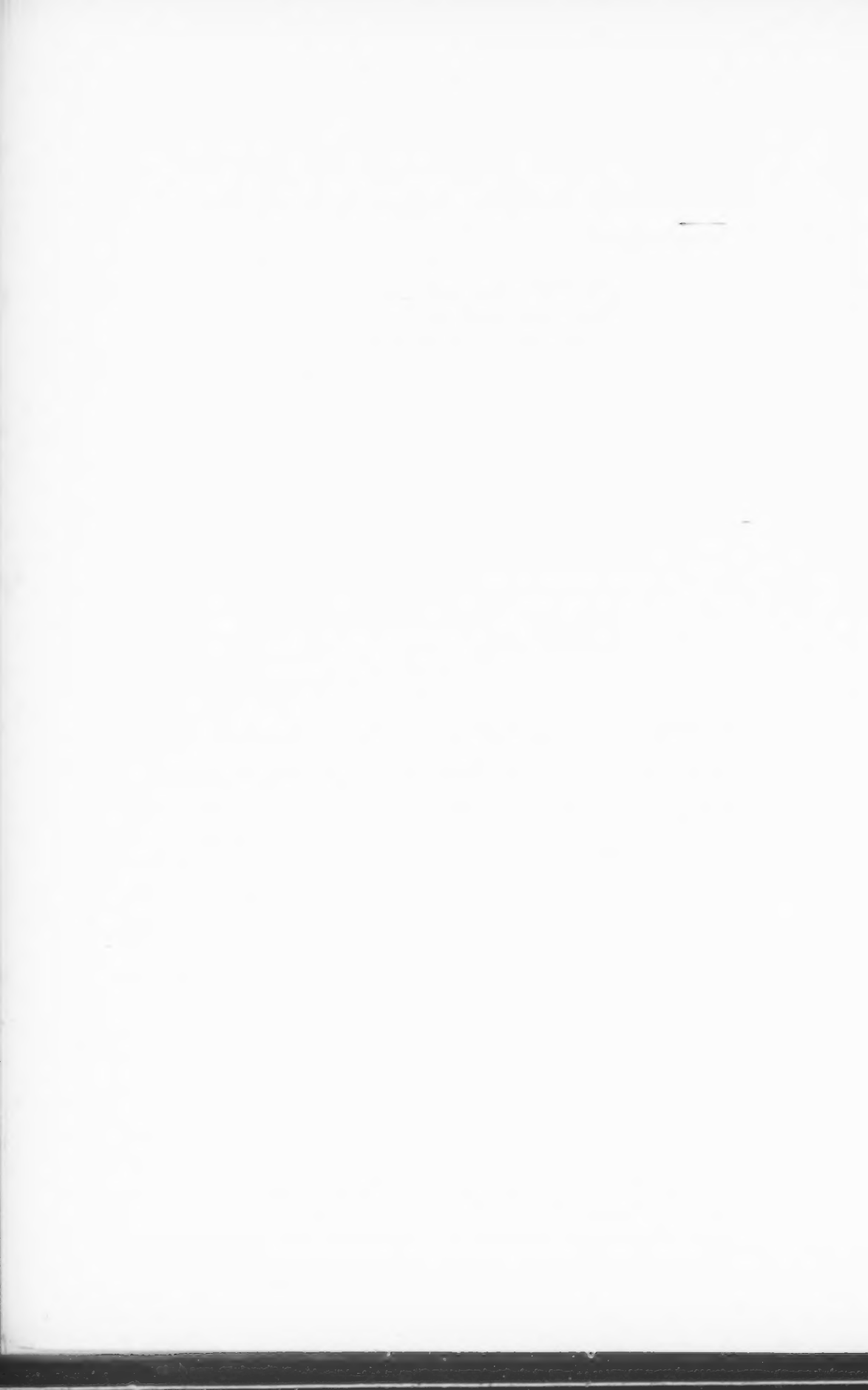
on the 27th of August, 1986, signed by
Justice Jules L. Spodek, the doctrine of
res judicata applies.*

The petitioner thereby and therein
was restored to his position of New York
City Transit Police Officer and eligible
for pay as of January 31, 1984 to July 1,
1986.

A-10

*Atlas-Feather Corp. v. Pine Top Ins.
Co., NYLJ, 7/31/86, p.11, Col. 3

*See Eleanor Spohn v. Yvonne K. Griffith,
101 App.Div.2d 1011, 1012.



Petitioner in the special proceeding bearing index #24426/86 seeks an order granting certiorari to review the proceedings below (that is, vacatur of penalty, dismissal and reinstatement of petitioner as stated in decision of the Appellate Division, Second Department and a determination that New York City Transit Authority was without jurisdiction when its hearing officer, Daniel Gutman rendered a finding after a hearing and that thereafter a decision of recommendation approved followed signed by the Vice President of Labor Relations.)

The relief sought is denied in its entirety. It should be noted the respondent never lost its acquired jurisdiction; the interim period between the decision of the Appellate Division, Second Department and the response by the respondent did not cause the New York City Transit Authority to lose or become divested of its in personam and subject matter jurisdiction.*

This Court is cognizant of the efforts made by petitioner to enjoin the remittal of the disciplinary proceeding on jurisdictional grounds. The Court in the proceeding captioned Demartino v.



Jules L. Spodek et al. denied petitioner's request. On appeal the Appellate Division, Second Department affirmed the Court's holding.

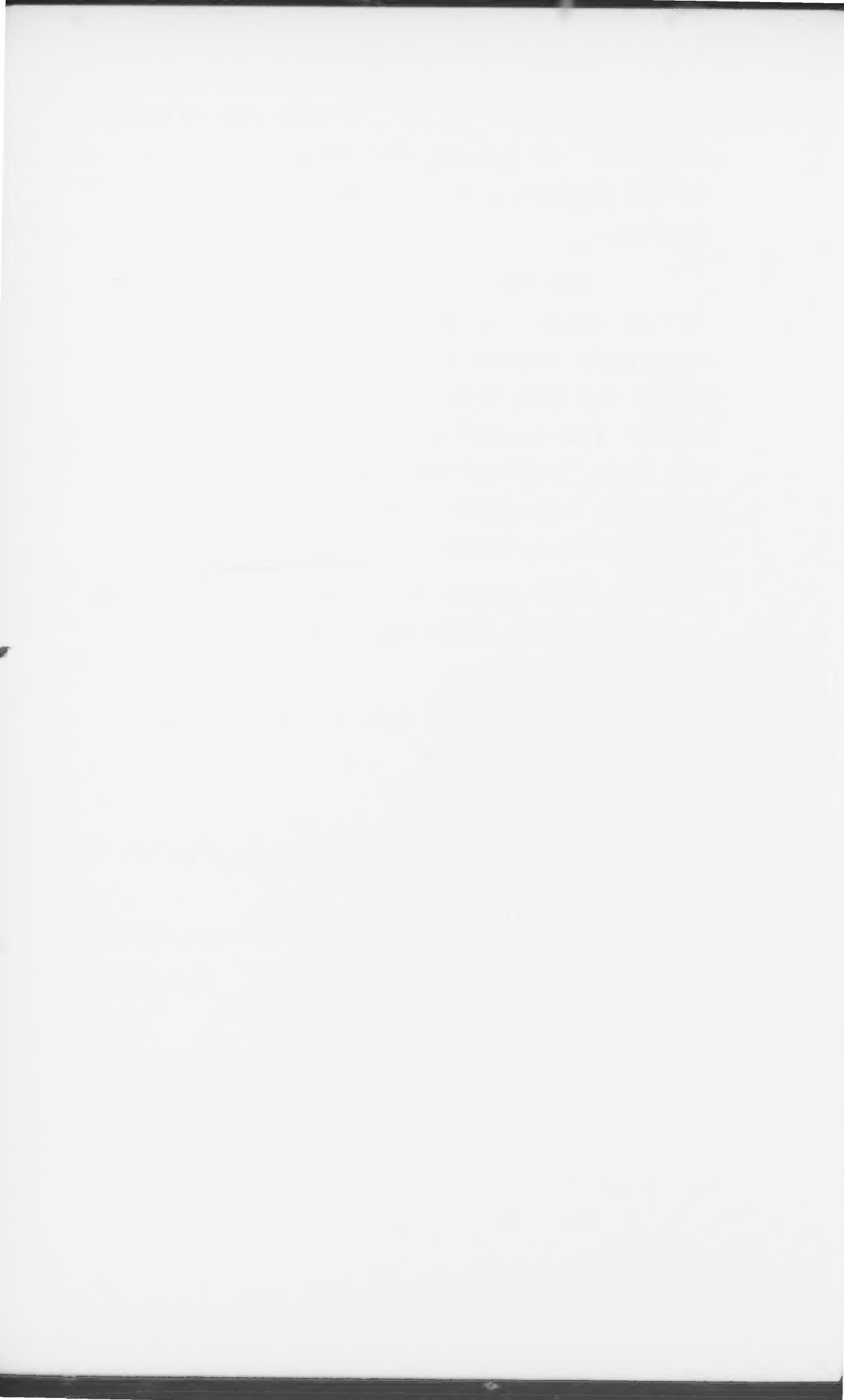
Thereafter on June 26, 1986 petitioner sought to enjoin the remitted disciplinary proceeding in Federal District Court for the Eastern District of New York. The relief was denied. On appeal to the U.S. Court of Appeals for the Second Circuit, the appeal was dismissed for procedural reasons on July 15, 1986.

This Court is constrained to and does find that both petitions are denied in their entirety.

This is the decision and order of the Court.

s/James W. Hutcherson
J.S.C.

*See Matter of Cromwell v. Charles Bates,
117 AD2d 667.



NEW YORK CITY TRANSIT AUTHORITY
TRIAL BOARD

-----X

In the Matter of Charles
of Misconduct and/or In-
competence under the provisions
of Section 75 of the Civil
Service Law, preferred by,

FINDINGS
and
RECOMMEN-
DATIONS

NEW YORK CITY TRANSIT AUTHORITY

-against-

June 27, 1986

CHARLES DeMARTINO

Case 77/82

Respondent

-----X

DANIEL GUTMAN, Hearing Referee

A P P E A R A N C E S:

ALBERT C. COSENZA, General Counsel
by KENNETH HOWARD SCHIFFRIN, Assistant
General Counsel; and LAURA G. JOHNSON,
Assistant General Counsel for the New York
City Transit Authority

SAM FOLUR, Esq., for the
Respondent

Statement and Recommendation

On June 26, 1986, this proceeding
against Charles DeMartino, on charges of
misconduct and/or incompetence was continued.
A Trial Board hearing was held pursuant to
a Judgment and Order of the Appellate
Division, Second Department for consideration
of the issue of an appropriate penalty. The



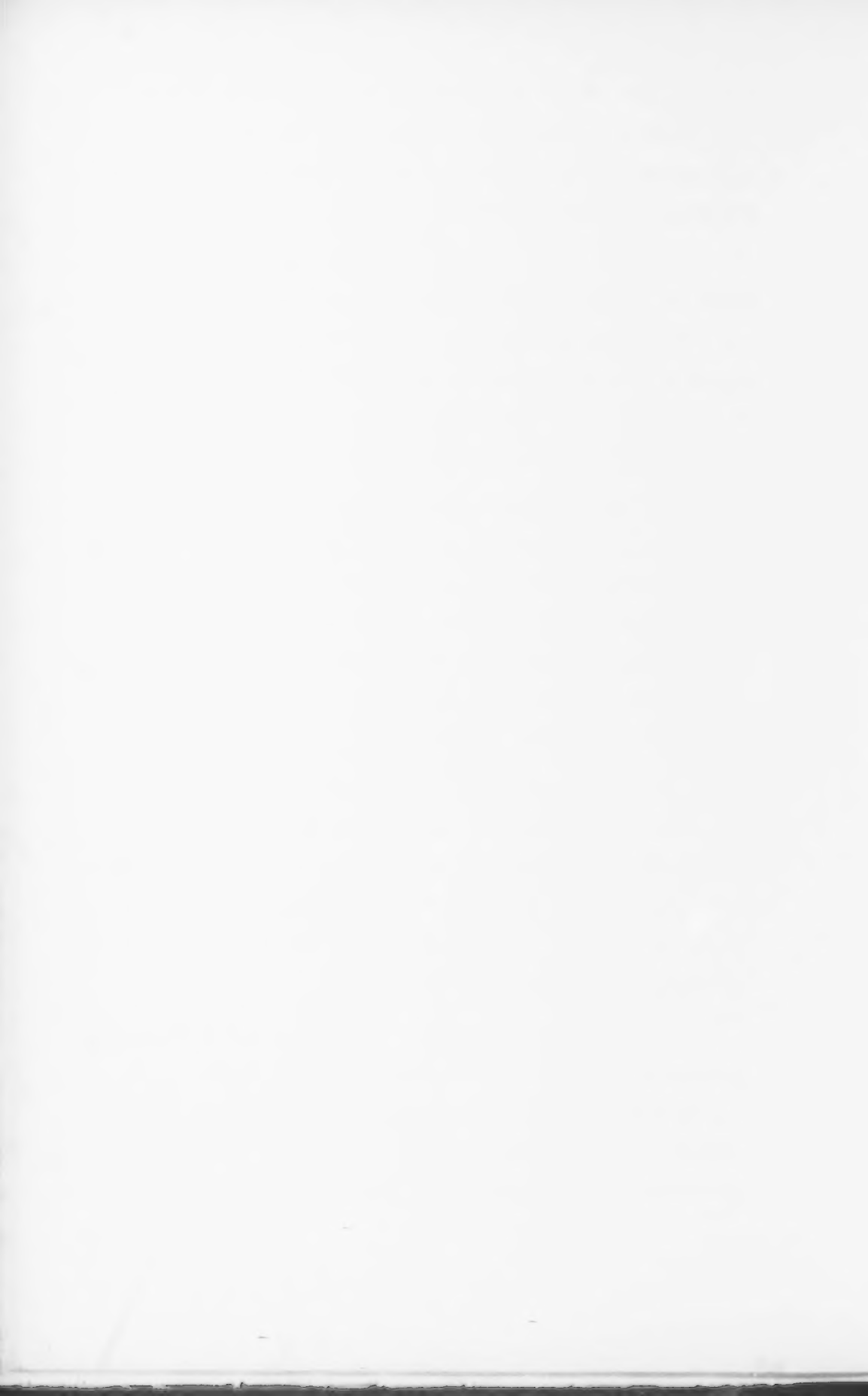
basis for this procedure is set forth in the opinion and decision of the Appellate Division Second Department, dated February 18th, 1986.

At this hearing, Counsel for the Authority and the Respondent DeMartino and his counsel appeared. The comprehensive arguments of counsel are set forth in the record of the hearing and in the memoranda submitted by both parties.

Respondent DeMartino challenged the proceeding herein, contending that the Trial Board lacks jurisdiction. He refused to participate in or abide by any discussion or reconsideration for the penalty imposed upon him, which was the subject of the order of the Appellate Division.

Counsel for the Transit Authority argued for dismissal of the Respondent from the service of the Authority. Nothing was submitted by the Respondent DeMartino that could be considered in mitigation of the penalty of this charge.

I have reconsidered the original recommendation of discharge. I have listened to the argument advanced by able Counsel for each of the parties, and have reviewed the memoranda submitted by them on



the basis of the proven charges, which were the subject matter of the original hearing. As considered independently and in conjunction with the annexed portions of Respondent's personnel file which were presented at the hearing and were previously provided to respondent's counsel, I am constrained to adhere to the original determination herein, and to recommend that Charles DeMartino be dismissed from the service of the Transit Authority.

There was some discussion at the hearing of June 26th, 1986, concerning the effective date of the said Respondent's dismissal. In my opinion, that is not a matter for me to determine.

s/ Daniel Gutman
Hearing Referee

400/BTH:mm

DECISION:

RECOMMENDATION APPROVED: and the effective date of dismissal remains January 31, 1984.

s/ Jim Buckley
Vice President, Labor Relations

7/1/86 12:00 noon.

At a Term of the Appellate
Division of the Supreme
Court of the State of
New York, Second Judicial
Department, held in
Kings County on
February 18, 1986

HON. WILLIAM C. THOMPSON, Justice Presiding
HON. RICHARD A. BROWN,)
HON. MOSES M. WEINSTEIN,) Associate Justices
HON. GERALDINE T. FIBER.)

-----X
Charles DeMartino, : JUDGMENT
Petitioner, :
v. :
Robert Kiley, as Chairman :
of the New York City :
Transit Authority, et. al., :
Respondents. :
-----X

The above named Charles DeMartino, petitioner, having instituted this proceeding pursuant to CPLR article 78 by a petition verified May 23, 1984 to review a determination of the respondents, dated January 23, 1984, which, after a hearing, found petitioner guilty of misconduct and dismissed him from his position as a police officer with the New York City Transit Authority; the respondents having filed an answer thereto; by order of the Supreme Court, Kings County, dated July 26, 1984, the proceeding was transferred to this court for disposition; and the proceeding



having been argued by Kenneth E. Gordon, Esq., of counsel for petitioner and argued by George S. Grubsmith, Esq., of counsel for respondents, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED, ADJUDGED and DECREED that the petition is hereby granted to the extent of vacating the penalty imposed, on the law, with costs, and the matter is hereby remitted to the respondent New York City Transit Authority for reconsideration of the issue of an appropriate penalty in accordance with the said opinion and decision slip of the court herein dated February 18, 1986.

Enter:

IRVING N. SELKIN
Clerk of the
Appellate Division



WILLIAM C. THOMPSON, J.P.
RICHARD A. BROWN
MOSES M. WEINSTEIN
GERALDINE T. EIBER, JJ.

A - December 3, 1985

Charles DeMartino, petitioner,
v. Robert Kiley, as Chairman
of the New York City Transit
Authority, et al., respondents.

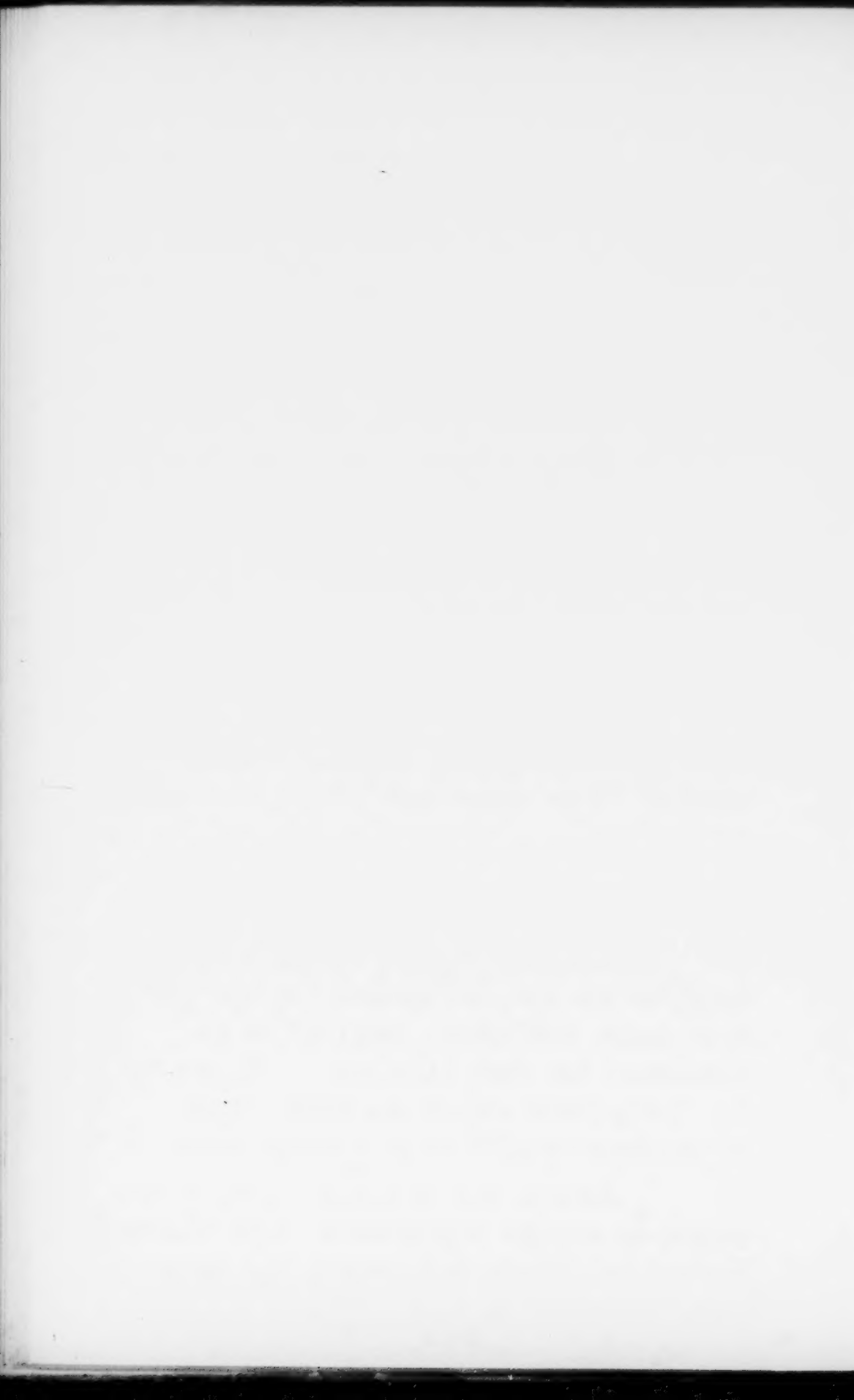
Gordon & Gordon, P.C., New York, N.Y.
(Richard Imbrogno of counsel), for
petitioner.

Albert C. Cosenza, Brooklyn, N.Y.
(George S. Grusmith of counsel),
for respondents.

Proceeding pursuant to CPLR article
78 to review a determination of respondents,
dated January 23, 1984, which, after a
hearing, found petitioner guilty of miscon-
duct and dismissed him from his position as
a police officer with the New York City
Transit Authority.

Petition granted to the extent of
vacating the penalty imposed, on the law,
with costs, and matter remitted to the
respondent New York City Transit Authority
for reconsideration of the issue of an
appropriate penalty in accordance herewith.

Substantial evidence exists in the
record to support respondents' determination
sustaining the charges against the petitioner
(see, Matter of De Bois v. Rozzi, ___ AD2d ___



(2d Dept., Nov. 4, 1985)). However, in determining an appropriate sanction, the Hearing Officer consulted petitioner's departmental file with respect to his prior disciplinary record. Petitioner's employment record was not introduced into evidence at the hearing nor was petitioner notified that his employment record would be considered by the Hearing Officer in determining an appropriate penalty.

Under a similar set of circumstances, the Court of Appeals held that the petitioner was entitled to prior notice of adverse material contained in his personnel file and to an opportunity to rebut such evidence prior to the determination of a penalty (Matter of Bigelow v. Board of Trustees of Inc. Vil. of Gouverneur, 63 NY2d 470). In view of the Hearing Officer's failure to notify the petitioner that his employment record would be considered in arriving at a determination of a penalty and to afford petitioner an opportunity to challenge the record and submit mitigating data with regard to information contained therein, a remittal of the matter is required.

THOMPSON, J.P., BROWN, WEINSTEIN and EIBER, JJ.,
concur

February 18, 1986 DeMartino v. Kiley 2104E



NEW YORK CITY TRANSIT AUTHORITY
TRIAL BOARD

-----X

In the Matter of Charges of
Misconduct and/or Incompe-
tence under the provisions
of Section 75 of the Civil
Service Law, preferred by

FINDINGS
AND
RECOMMEND-
ATIONS

NEW YORK CITY TRANSIT
AUTHORITY

Case No.
77-82

-against-

Dec. 10,
1983

CHARLES DeMARTINO

Respondent

-----X

DANIEL GUTMAN, Hearing Referee

A P P E A R A N C E S:

RICHARD K. BERNARD, General
Counsel by LAURA G. JOHNSON,
Assistant General Counsel for
the New York City Transit
Authority

PHILLIPS, NIZER, BENJAMIN,
KRIM and BALLON, Esqs., WILLIAM A.
TANENBAUM, Esq., of counsel for
the Respondent

STATEMENT

Charles DeMartino, R.D. #1 -
Tally Ho Road, Mt. Hope, New York,
Police Officer, Shield No. 3013, Pass
212133, Transit Police Department, has



been charged with Misconduct and/or Incompetence in that he failed to notify the sick desk, upon leaving his sick location on August 24, 25 and September 9, 1982; also, on August 25 and September 9, 1982, while away from sick location for more than three hours, failed to notify sick desk of his location during that period. On August 24 and September 7, 1982, he failed to notify sick desk of his return to his sick location, as is more particularly set forth in Exhibit #1 of the transcript of the hearing, which is attached hereto and made a part hereof.

Police Officer DeMartino was present at the hearings scheduled on July 7, 21, and 28, 1983, August 3, 25, September 1, 1983.

Police Officer DeMartino is 39 years of age and has been in service since December 1, 1965.



Finding of Fact

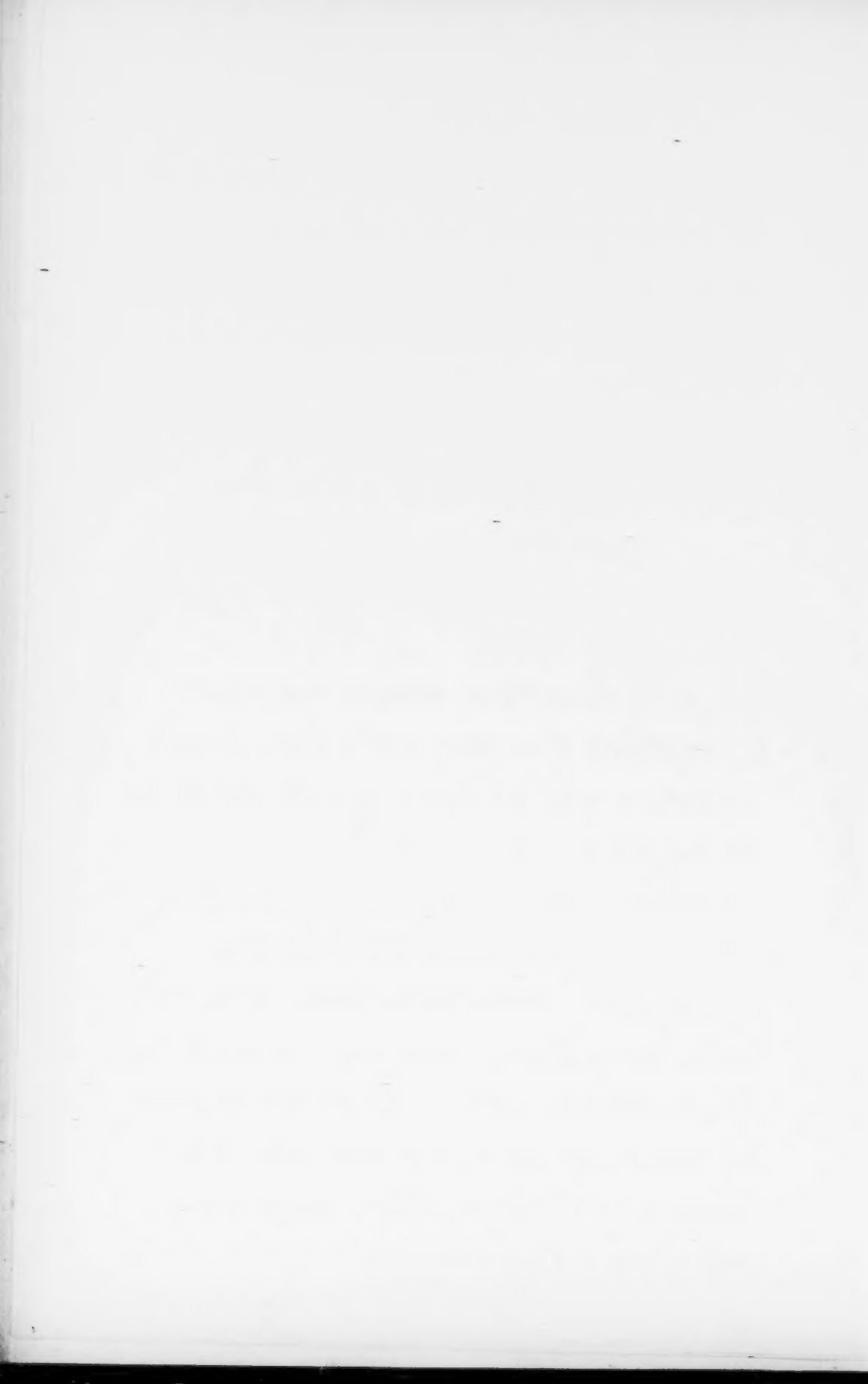
At the hearing, the charges herein were amended by striking references to the dates of August 24 and August 25, where same appear in Specifications (e), (f) and (g).

The charges were proved by substantial evidence and were sustained.

Recommendation

As to the measure of penalty.

Having found charges sustained, I consulted this employee's disciplinary record, a copy of which is attached hereto and made a part hereof. Employed since December 1, 1965, Respondent has had 3 Cautions, 11 Departmental Hearings, (1968, 1969, 1969, 1970, 1970, 1970, 1970, 1972, 1972, 1981, 1981) and 1 prior Trial Board Hearing (1977). After the hearing of August 23, 1970, and the Trial Board Hearing of August 5, 1977, Respondent was given a Final Warning.



ACCORDINGLY, it is RECOMMENDED
that the charges be sustained and that
Respondent be dismissed from the
service.

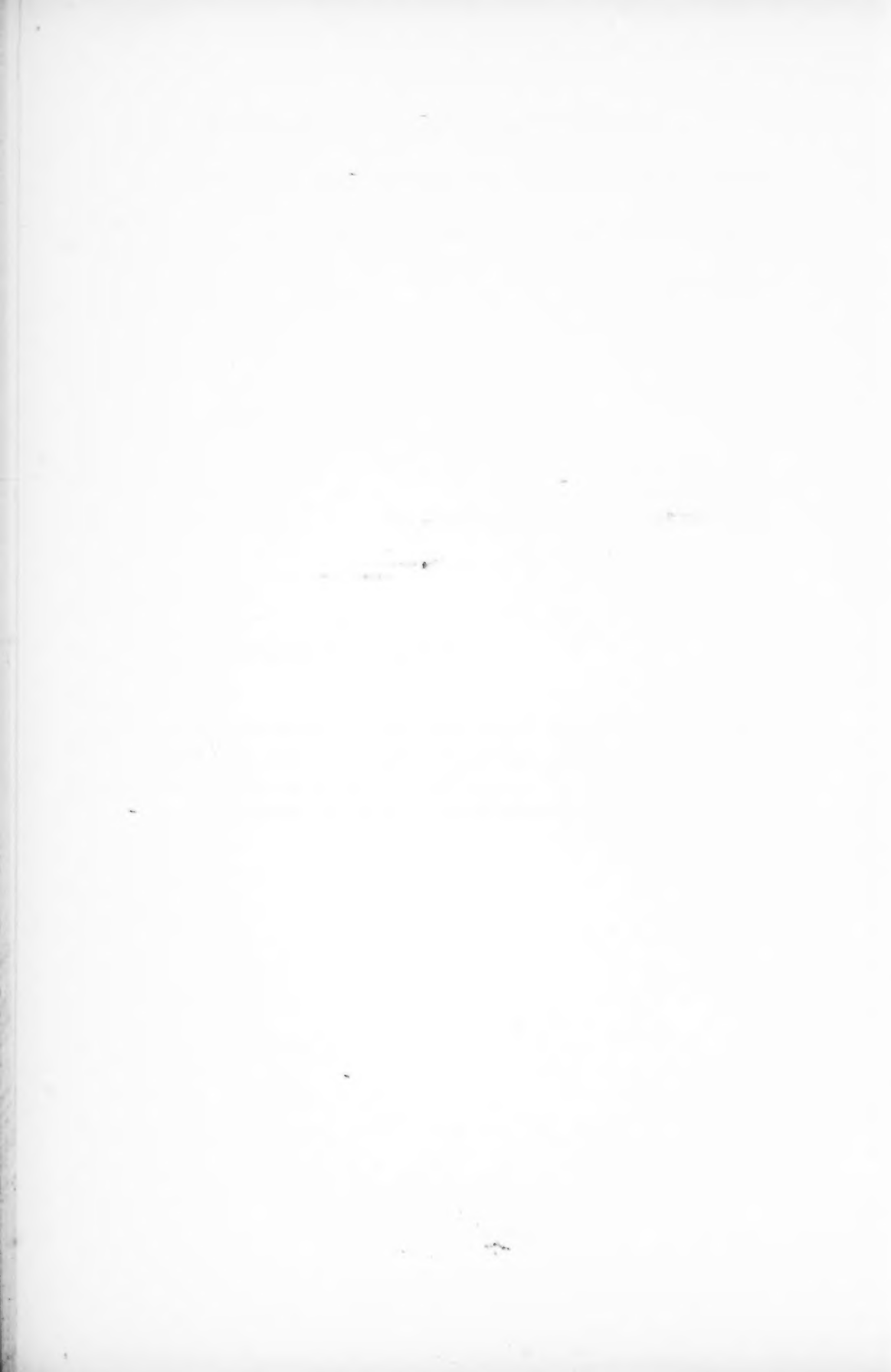
s/
Hearing Referee

175/DG:emc
DECISION:
RECOMMENDATION APPROVED:

JAN. 23, 1984

s/
Acting President

*This case was decided and recommendation submitted several months ago. The recommendation apparently was misplaced, and this recommendation subsequently was prepared.



P E R S O N N E L O R D E R	N U M B E R 6.2
	D A T E Jan. 31, 1984

TERMINATION

The services of the following Police Officer have been terminated:

EFFECTIVE C.O.B. TUESDAY, JANUARY 31, 1984

<u>POLICE OFFICER</u>	<u>SHIELD</u>	<u>I.D. #</u>	<u>DC/SQUAD</u>
DeMartino, C.	3013	212133	01 8

COMMAND

11

Amend all records accordingly.

130:JCD:ib

s/
John C. Driscoll
Inspector
In Command
Headquarters Bureau